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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. ~~807~~ 31

NORTON I. KRETSKE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Citations.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Norton I. Kretske, petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above cause, affirming the judgment of the District Court for the Northern District of Illinois, and respectfully shows:

(Wherever the word "petitioner" is used herein, it will be deemed to refer to the defendant Norton I. Kretske in the District Court of the United States for the Northern District of Illinois, Eastern Division, the appellant in the United States Circuit Court of Appeals for the Seventh Circuit, and the petitioner here. Wherever the term "instant court" is used, it will be deemed to refer to the United States Circuit Court of Appeals for the Seventh Circuit.)

I.

Summary statement of the matter involved.

Judgment of conviction was rendered against petitioner, Norton I. Kretske, on May 17, 1940, by the District Court of the Northern District of Illinois, Eastern Division, adjudging him guilty of the crime of conspiracy to defraud the United States. He was named in the indictment with Daniel A. Glasser, Alfred E. Roth, Anthony Horton and Louis Kaplan. During part of the time covered by the indictment petitioner Kretske was an Assistant District Attorney for said District. The said Glasser during all of said time was an Assistant District Attorney for said District. The petitioner was sentenced to be confined for a term of 14 months in a Federal penitentiary. All the other defendants likewise were convicted and at the same time sentenced, the defendant Glasser receiving a sentence of 14 months in a Federal penitentiary, the defendant Kaplan received the same sentence, the defendant Horton was sentenced to a term of one year, to be served on probation, and the defendant Roth to a fine of $500.00. Neither Horton nor Kaplan appealed from this judgment. Petitioner herein, with Glasser and Roth, appealed to the Circuit Court of Appeals for the Seventh Circuit, where the judgment imposing the sentences was

affirmed which judgment and opinion appear at p. 1117 of the record. A rehearing was refused.

The Testimony.

The record of the testimony is voluminous, consisting of approximately 4,200 pages. The exhibits consist of at least 2,500 pages. While all the briefs upon appeal made efforts to present this evidence in an accurate outline, the Circuit Court of Appeals did not make any attempt to set out anything like a complete outline of the evidence. As petitioner does not contend that this evidence, as accepted by the jury, does not present a jury question, no effort will be, nor can be, made within the requirements of the Rules of this Court, to present the whole of this evidence in outline. At appropriate places an attempt will be made to state from the record such facts as will present the several questions sought to be presented. In this connection, the reasons relied upon will be set forth. Also it will be attempted to show how the questions advanced upon the record as justifying the review prayed for do in fact justify it. It will be further attempted to show that the determination of each of these several questions is necessary to a complete determination of the case presented by this petition.

II.

Reasons relied upon for allowance of the writ.

1. The first reason relied upon is that the petitioner was denied due process of law because the grand jury which returned the indictment against him was illegally constituted and void, because of the intentional, total exclusion of the female sex from the jury box from which

grand jurors were drawn, the state law making it mandatory that women be placed on the jury lists.

This question was raised by motion to quash before plea (Rec. 141), and denied on Government's motion to strike. (Rec. 151.)

2. The second reason relied upon is that petitioner was illegally put to trial upon a record which shows that the indictment, which is the basis of the charge against him, was not returned into open court. (Rec. 39.)

This proceeding was challenged by a motion to quash the indictment, which motion in full appears at Rec. 141-142, to which proceeding the Government filed a motion to strike, which was sustained. (Rec. 151.) This ruling presents the question of a conflict of decisions between the instant court and the Court of Appeals for the Fourth Circuit. (See Br., p. 13.) The question thus presented justifies the issuance of the writ thus prayed for (hereinafter called the writ), and the determination of this question is necessary to a proper determination of this case, coupled with the further assertion that the Court, in overruling the motion to quash the indictment upon this particular ground decided an important question of Federal law which has not been, and should be, settled by this Court.

3. The third reason relied upon is that petitioner was put to trial on an indictment which failed to inform him of the nature and cause of the accusation against him, in contravention of the Sixth Amendment to the Constitution of the United States, against the demurrer to the indictment asserting particularly these specifications:

a—The count upon which he was convicted failed to charge any crime against the laws of the United States.

b—This count was based upon the conclusions of the

pleader, and failed to set forth with reasonable certainty any facts from which said conclusions could be drawn.

c—This count was so vague, indefinite, uncertain and ambiguous that it failed to allege the ultimate and issuable facts of a conspiracy.

(This count of the indictment may be found at Rec. 22-37, and the demurrer thereto is to be found at Rec. 57-58. See Br., p. 13.)

This ruling is probably in conflict with the applicable decisions of the Supreme Court of the United States, in construing the allegations in the indictment to the end that it may conform with the provisions of the Sixth Amendment to the Constitution of the United States. (See Br., p. 13.)

4. The fourth reason relied upon is that there was a total, systematic exclusion from the jury box of females who were not members of a private League of Women Voters, and who had not, as members of this League, attended certain jury classes maintained for the purpose of giving instructions to potential jurors, in which lectures presented the views of the prosecution, which excluded persons otherwise possessed of the requisite qualifications for jury service. This was a denial of the constitutional right of trial by an impartial jury, in violation of the Fifth Amendment to the Constitution of the United States. (Rec. 103-104; see Br., p. 14.)

5. The fifth reason relied upon is that the admission in evidence of Government's Exhibits 81A and 113, severally, containing hearsay and highly inflammatory statements, is a denial of the right of confrontation with the witnesses whose statements appeared in said Exhibits. Rec. 533 shows the introduction of Government's Exhibit 81A and Rec. 532 shows the introduction of Government's Exhibit 113.

This ruling is probably in conflict with the decisions of the Supreme Court of the United States.

6. The sixth reason relied upon is that the petitioner was denied a fair and impartial trial, and denied the benefit of the presumption of innocence, by the activities of the trial judge.

The trial judge in questioning witnesses was not calmly judicial, dispassionate and impartial. He participated in the trial most actively, and not only failed sedulously to avoid all appearance of advocacy on questions ultimately for the jury, but by his activities conveyed to the jury his co clusions on these subjects. He further by his cross-examination of witnesses deprived petitioner of a fair and impartial trial. (Rec. 241, 307-310, 545, 816-817, 850-851, 869-870, 873, 941, 943, 1030, 243, 297, 348-349, 536, 232, 294, 602, 615, 625, 627-628, 644-646, 270, 273, 274, 196, 659, 990-991, 1000-1002.)

The question presents a conflict in the decisions of the instant Court on the one hand, and the decisions of the Circuit Courts of Appeal of the Fifth, Sixth and Ninth Circuits on the other hand. (See Br., pp. 16, 20.)

7. The seventh reason relied upon is that the judge imposed such a limitation of the right of cross-examination as (a) to fatally prejudice petitioner, and (b) to constitute a denial of due process of law. (Testimony of Campbell, Rec. 1041-1042; Testimony of Swanson, Rec. 237; Testimony of Dewes, Rec. 554-555.)

This decision is probably in conflict with the applicable decisions of the Court of Appeals for the Eighth Circuit, and with the applicable decisions of this Court. (See Br., p. 15.)

8. The eighth reason relied upon is that it was reversible error to examine the witnesses for the defendants beyond the time and subject matter embraced in the direct

examination, the effect and purpose of the cross-examination being the showing of matter against the defendants, which, if proved at all, should have been proved by the Government as part of its case in chief; the impeachment of the witnesses, showing commission of crimes not felonious nor involving moral turpitude, and for the purpose of adducing facts favorable to the Government, without the Government making the person a witness for itself, touching upon the matters upon which cross-examination was conducted. (See Reason No. 6 herein, and the Record set out in support thereof, which shows such cross-examination conducted not by the prosecuting attorney, but by the judge. (See Br., p. 15.)

9. The ninth reason relied upon is that the prosecutor, (a) by leading questions persistently put testimony into the mouths of accomplice witnesses vital to the prosecution, and fatal to the defense, and thus substituted his testimony for that of an accomplice witness; (b) upon cross-examination repeatedly put to a defendant while on the stand, absolutely unnecessarily, the same question in regard to a material matter; (c) after he went partially into a matter on examination in chief, the judge refused, upon the objection of the prosecutor, to permit the defendant to inquire further into the matter; (d) after he had turned over to the defendant witnesses for cross-examination, on re-examination did not confine himself exclusively to the matter developed in cross-examination; (e) was permitted to continuously introduce evidence out of the usual order without showing good and exceptional cause for doing so; and (f) upon request he refused the right of the defendant Glasser to examine a material Government document which was relied upon by the Government, and which was in the sole possession of the Government. (Rec. 206, 520-523, 636, 660, 661, 289, 979, 982-983, 1034-1036.)

This decision is in conflict with the decisions of the Circuit Court of Appeals for the Eighth Circuit, and the court has so far departed from the accepted and usual course of procedure, and so far sanctioned such departure, as to call for the exercise of this Court's power of revision. (See Br., p. 15.)

10. The tenth reason relied upon is that it was reversible error (a) for the Court to admit in evidence a prejudicial act disconnected with the conspiracy charged; (b) to admit in evidence against the defendants a highly prejudicial statement, act or declaration made by another alleged conspirator after the determination of the alleged conspiracy; and (c) to exclude important evidence operating in behalf of the defendants. (Rec. 680-689, 923-924.)

These rulings give rise to a conflict with the decisions of the Second, Third, Sixth, Eighth, Ninth and Tenth Circuit Courts of Appeal, and the Supreme Court of the United States. (See Br., pp. 18, 44.)

11. While all these rulings and conduct were not directed immediately against the petitioner, in view of the fact that the sole charge on which he was convicted was that of conspiracy, upon the authority of this Court, such are available to him as prejudicial error committed against him.

Logan v. *U. S.*, 144 U. S. 263, 309.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Seventh Circuit had in the case numbered and entitled on its docket, No. 7316, Norton I. Kretske, Appellant, *vs.*

United States of America, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Seventh Circuit be reversed by the court, and for such further relief as to this court may seem proper.

Dated: February 26, 1941.

NORTON I. KRETSKE,
Petitioner.

By EDWARD M. KEATING.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. .....

NORTON I. KRETSKE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of courts below.

The District Court for the Northern District of Illinois, Eastern Division, did not deliver a written opinion. The opinion of the instant court is reported in 116 Fed. (2d) 690, under the title of *Norton I. Kretske* v. *United States of America*, and is to be found at p. 1117 of the Record.

II.

Jurisdiction.

The date of the judgment of the instant court sought to be reviewed is December 13, 1940. A petition for rehearing was filed, and denied on January 13, 1941. The statutory provision which is believed to sustain the jurisdiction of this Court is Sec. 347(a), Title 28, United States Code (Judicial Code Sec. 240(a), amended by Act of February 13, 1925).

The nature of the rulings and the facts pointed out in the Record as stated on pp 3-8 of the preceding petition are such as to bring the case within the jurisdiction of the provision relied upon. This statement is incorporated herein by reference, to save repetition here.

III.

Statement of the case.

This has already been stated in the preceding petition under III (p. 2), and is hereby adopted and made a part of this brief.

IV.

Specification of errors.

For brevity, the allegations of error contained and stated under "Reasons Relied Upon for Allowance of this Writ", in the preceding petition (pp. 3-8) are hereby presented as the assignments of error herein and incorporated at this point, to the same extent and for all purposes as though fully expressed here.

V.

Summary of the argument.

A.

The Court erred in denying the motion to quash the indictment.

1. The grand jury was illegally constituted because women were systematically excluded therefrom. (Rec. 212.)

Norris v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1075.
Pierre v. *Louisiana*, 306 U. S. 354, 83 L. Ed. 757.
Crowley v. *U. S.*, 194 U. S. 461, 48 L. Ed. 1075.
People v. *Mack*, 267 Ill. 481.

2. The indictment was not properly returned in open court.

3. The indictment was filed without the proper order of court directing the receiving and filing of said indictment.

Renigar v. *U. S.*, 172 Fed. 647.
Yundt v. *People*, 65 Ill. 373.
Rainey v. *People*, 8 Ill. 71.

B.

The Court erred in overruling the demurrer of the appellant, because:

1. The indictment is vague, indefinite and uncertain, and did not advise the appellant of the charge which he had to meet with reasonable particularity as to persons, time, places and circumstances, and is therefore fatally defective.

U. S. v. *Cruikshank*, 92 U. S. 542, 23 L. Ed. 588.
Miller v. *U. S.*, 136 Fed. 581 (C. C. A. 7).

Beck v. *U. S.*, 33 Fed. (2d) 107 (C. C. A. 8).
Boykin v. *U. S.*, 11 Fed. (2d) 484 (C. C. A. 5).
Anderson v. *U. S.*, 269 Fed. 65 (C. C. A. 9).
Brenner v. *U. S.*, 260 Fed. 636 (C. C. A. 2).
Fontana v. *U. S.*, 262 Fed. 283 (C. C. A. 8).
McKenna v. *U. S.*, 127 Fed. 88.
Bartlett v. *U. S.*, 106 Fed. 884 (C. C. A. 8).
Pierre v. *U. S.*, 275 Fed. 352 (C. C. A. 8).
Collins v. *U. S.*, 253 Fed. 609 (C. C. A. 9).

2. The indictment is repugnant and inconsistent.

Larkin v. *U. S.*, 107 Fed. 897 (C. C. A. 7).
White v. *U. S.*, 67 Fed. (2d) 77 (C. C. A. 10).
U. S. v. *Rhodes*, 212 Fed. 515 (D. C. Ala.).

3. The indictment leaves a doubt in the mind of the Court concerning the offense intended to be charged and therefore is fatally defective for uncertainty.

Bratton v. *U. S.*, 73 Fed. (2d) 795 (C. C. A. 10).

C.

There was error in the total, systematic exclusion from the jury box of females who were not members of a private League of Women Voters, and who had not, as members of this League, attended certain jury classes maintained for the purpose of giving instructions to potential jurors, in which lectures presented the views of the prosecution, which excluded persons otherwise possessed of the requisite qualifications for jury service.

Norris v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1075.
Pierre v. *Louisiana*, 306 U. S. 354, 83 L. Ed. 757.
People v. *Mack*, 267 Ill. 481.

D.

The defendants were denied a full cross-examination of witnesses produced against them upon the subject matter of their respective examinations in chief. They were not permitted to substantially exercise this right to their definite prejudice.

Alford v. *U. S.*, 282 U. S. 687, 75 L. Ed. 624.

District of Columbia v. *Clawans*, 300 U. S. 616, 81 L. Ed. 843.

Gilmer v. *Higley*, 110 U. S. 47, 28 L. Ed. 62.

Moyer v. *U. S.*, 78 Fed. (2d) 624 (C. C. A. 9).

Asgill v. *U. S.*, 60 Fed. (2d) 776 (C. C. A. 4).

Minner v. *U. S.*, 57 Fed. (2d) 506, 511, 512 (C. C. A. 10).

Heard v. *U. S.*, 255 Fed. 829 (C. C. A. 8).

Harrold v. *Oklahoma*, 169 Fed. 47 (C. C. A. 8).

Collenger v. *U. S.*, 50 Fed. (2d) 345, 350, 351 (C. C. A. 7).

E.

It was reversible error to cross-examine the witnesses for the defendants beyond the time and subject matter embraced by the direct examination, and the cross-examination's purpose and effect the showing of matter against the defendants which, if proved at all, should have been proved by the Government as part of its case in chief, the impeachment of the witnesses without showing the commission of crime or other impeaching facts, and adducing facts favorable to the Government, without making the witness one for the Government, touching upon the matters upon which cross-examination was conducted.

Tucker v. *U. S.*, 5 Fed. (2d) 818, 822, 823, 824 (C. C. A. 8).

Wilson v. *U. S.*, 4 Fed. (2d) 888 (C. C. A. 8).
Terzo v. *U. S.*, 9 Fed. (2d) 357 (C. C. A. 8).
Havener v. *U. S.*, 15 Fed. (2d) 503 (C. C. A. 8).
Gideon v. *U. S.*, 52 Fed. (2d) 427 (C. C. A. 8).
Haussener v. *U. S.*, 4 Fed. (2d) 884, 887 (C. C. A. 8).
Lawrence v. *U. S.*, 18 Fed. (2d) 407 (C. C. A. 8).
Middleton v. *U. S.*, 49 Fed. (2d) 538 (C. C. A. 8).
Harrold v. *Oklahoma*, 169 Fed. 47, 52, 53 (C. C. A. 8).
People v. *Newman*, 261 Ill. 11, 103 N. E. 489.
People v. *Geidras*, 338 Ill. 340.
State v. *Cannon*, 66 Mo. 116.
People v. *Adams*, 76 Cal. App. 178, 244 Pac. 106.
People v. *Fleming*, 166 Cal. 359, 381, 136 Pac. 291, 302.
Hernsley v. *Commonwealth* (Ky. Court of Appeals), 31 Ky. Law Rep. 386.
State v. *Borri*, 199 S. W. 136, 138 (Mo.).
People v. *Quinn*, 295 Pac. 1043.

F.

The trial judge took a very active part in the trial of this cause. He questioned witnesses, cross-examined witnesses, and by his attitude and conduct clearly indicated his belief in the guilt of the defendants. In questioning witnesses he was not calmly judicial, dispassionate, and impartial, and his conduct, taken as a whole, presented all the characteristics of advocacy. This, we contend, is reversible error.

Frantz v. *U. S.*, 62 Fed. (2d) 737, 739 (C. C. A. 6).
Hunter v. *U. S.*, 62 Fed. (2d) 217, 220 (C. C. A. 5).
Adler v. *U. S.*, 132 Fed. 464, 472 (C. C. A. 5).
Williams v. *U. S.*, 93 Fed. (2d) 686 (C. C. A. 9).

Connley v. *U. S.*, 46 Fed. (2d) 53, 54, 56 (C. C. A. 9).

Glover v. *U. S.*, 46 Fed. (2d) 53, 54, 56 (C. C. A. 9).

McNutt v. *U. S.*, 267 Fed. 671 (C. C. A. 8).

Rutherford v. *U. S.*, 258 Fed. 855 (C. C. A. 2).

People v. *Egan*, 331 Ill. 489, 163 N. E. 357.

People v. *Rongetti*, 331 Ill. 581, 163 N. E. 373.

People v. *Cunningham*, 195 Ill. 550, 63 N. E. 517.

G.

It was reversible error for the prosecutor to resort to prejudicially improper methods to bring about a conviction.

1. He repeatedly put to witnesses against the defendants the same question in regard to material matters.

2. He went into matters partially upon examination in chief and by his objections prevented the defendants from properly examining into the same matters on cross-examination.

3. He repeatedly re-examined witnesses far beyond the matters touched upon in cross-examination, and persistently did this.

4. He repeatedly introduced evidence out of its usual order without showing good and exceptional causes for doing so.

5. He refused the defendant Glasser the right to examine a material document in his possession, which was relied upon as evidence against him.

Berger v. *U. S.*, 295 U. S. 78, 79 L. Ed. 78.

Pharr v. *U. S.*, 48 Fed. (2d) 767 (C. C. A. 6).

People v. *Barberi*, 149 N. Y. 256, 275, 276.

Harrold v. *Oklahoma*, 169 Fed. (2d) 47 (C. C. A. 8).

State v. *Nugent*, 116 La. Rep. 99.
State v. *Denis*, 19 La. Ann. 119.
State v. *Wright*, 4 La. Ann. 589, 590, 591.
Williams v. *Commonwealth*, 90 Ky. Rep. 596.
Dalton v. *Commonwealth*, 226 Ky. Rep. 127, 130, 131.
Collins v. *Commonwealth*, 15 Ky. Law Rep. 691, 693.
Fletcher v. *Commonwealth*, 26 Ky. Law Rep. 1157.
People v. *Harper*, 145 Mich. 402, 108 N. W. 689.
Pharr v. *U. S.*, 48 Fed. (2d) 767 (C. C. A. 6).
Asgill v. *U. S.*, 60 Fed. 776.

H.

1. The Court erred in admitting and permitting to be read to the jury Exhibits Nos. 81A and 113 as evidence against the defendant Kaplan, and holding that it was for the jury to determine if they were evidence against anyone else. This evidence was irrelevant, prejudicial and hearsay evidence in documentary form, and the error was properly saved by a motion to withdraw a juror.

Cook v. *U. S.*, 138 U. S. 157, 184, 34 L. Ed. 908, 913.
U. S. v. *Dressler*, 112 Fed. (2d) Adv. Sheets 972 (C. C. A. 7).
Hass v. *U. S.*, 93 Fed. (2d) 427, 436 (C. C. A. 8).
Greenbaum v. *U. S.*, 80 Fed. (2d) 113, 125, 126, 127 (C. C. A. 9).
Paddock v. *U. S.*, 79 Fed. (2d) 872, 873, 874 (C. C. A. 9).
Brady v. *U. S.*, 39 Fed. (2d) 312, 314 (C. C. A. 8).
Naftzger v. *U. S.*, 200 Fed. 494, 499, 500 (C. C. A. 8).
Pharr v. *U. S.*, 48 Fed. (2d) 767 (C. C. A. 6).

2. This error could not be cured by any subsequent instructions to the jury.

Waldron v. *Waldron*, 156 U. S. 361, 39 L. Ed. 453.

Throckmorton v. *Holt*, 180 U. S. 552, 55 L. Ed. 663.

Holt v. *U. S.*, 94 Fed. (2d) 90, 94 (C. C. A. 10).

C. M. Spring Drug Co. v. *U. S.*, 12 Fed. (2d) 852.

ARGUMENT.

As to Points A, B, C, D and E, covered in the foregoing Summary of Argument, it is thought that they have been sufficiently covered there. In view of the limitations of space, in the following pages an attempt will be made only to further elucidate Points F, G and H.

F.

The Judge's conduct made the basis of the foregoing assignments of error as it applies to them may be thus summarized:

1. The Judge interfered with the re-direct examination of Elmer Swanson, a Government witness, and developed by answer to his question that the witness had heard that the defendant Horton had previously taken care of, fixed and manipulated cases, and that the witness thought Horton could similarly handle the case in which he was interested. (Rec. 241.) A motion was made to strike the answer which this question elicited, but it was overruled.

2. The Judge examined Frank Hodorowicz, a co-conspirator, witness for the Government, and developed that Hodorowicz had talked to one Frank Miller, a stranger to the indictment and likewise to any legal connection with the evidence, and developed that Miller told the witness he could "take care" of his case for $800.00, which witness paid. Witness did not know whether Miller used the money or not. That this Miller was in the bootlegging business and not a lawyer. (Rec. 307-308.) After further questioning by the Assistant District Attorney, the Judge again questioned the witness, reverting to the Miller inci-

dent, and entered into the details of that transaction, and re-emphasized it by repeated questions. (Rec. 309-310.)

3. During the cross-examination of the witness Dewes, the Judge made the witness repeat his testimony to the effect that the defendant Kretske (petitioner here) had resigned under pressure. (Rec. 545.) The Judge interfered with the cross-examination of Dewes in such a manner as to deprive the defendants of the right to a free and unrestricted cross-examination.

4. The Judge interrupted the cross-examination of Kretske by developing the fact that petitioner thought the trial of alcohol cases in the Federal Court involved some difficulty, and stated positively that there is nothing difficult in the trial of any of those cases, thus indicating his disbelief in the testimony of this witness. (Rec. 816-817.)

5. The Judge interrupted the direct examination of the defendant Roth, cross-examined him himself, and by the nature of his questions and his attitude, clearly indicated a disbelief of the testimony by Roth. Roth stated to Campbell that an agent named Bailey was going to get a number of United States Attorneys, lawyers, and judges in trouble, and that he, Roth, had heard Campbell's name mentioned. The Judge then proceeded to cross-examine the defendant vigorously as to the source of his information and by the nature of his questions indicated an utter disbelief in the statements made by Roth. (Rec. 850-851.)

At pages 869-870 of the Record, the Judge cross-examined the witness-defendant Alfred E. Roth, beyond the scope of his judicial authority in regard to a record on appeal in a farm libel case that bore a very remote, if any, relation to the issue. At 873, where Roth was being examined as to matters unrelated to his direct examination, his counsel objected on such grounds, to which objection the Judge retorted, "This is cross-examination."

6. Federal Judge Michael L. Igoe, witness for the defense, was asked by Assistant District Attorney Ward if he knew many of the defendants who had been arrested and prosecuted by the Government, to which Judge Igoe answered he did not know certain of them. Then the Assistant District Attorney said, "That's the point; I say you didn't know them, but Mr. Glasser does know them." A motion was made to have this statement stricken. This the judge refused to do. (Rec. 908.)

7. The Judge cross-examined the defendant Glasser in regard to a certain Nick Abesketes as follows:

> "The Court: Did you know at that time that Nick Abesketes was under indictment in the Eastern and Western Districts of Wisconsin?
>
> A. No, sir.
>
> Q. Did you make any inquiry?
>
> A. No, sir; you see, my job was strictly to prosecute.
>
> Q. You were interested in getting Nick Abesketes?
>
> A. Yes, sir." (Rec. 941.)

8. At page 943 of the Record, the Judge re-emphasized this matter as follows: I think my impression was that there were two indictments pending in Wisconsin against Nick Abesketes on February 25, 1938. I will ask the District Attorney's Office to check with the Alcohol Division sometime during the day, to make sure about it.

9. At page 1030, the Judge said: At my request, the Government has furnished me with this. Let the record show that Nick Abesketes was indicted in the Western District of Wisconsin on January 27, 1936, and that he was indicted in the Eastern District of Wisconsin on July 30, 1938. * * * To the indictment in the Western District he pled guilty and was sentenced. * * * After that the indictment in the Eastern District was dismissed. It covers the same subject. I know that for a fact. * * * I happen to know all about Nick Abesketes.

Here the Judge himself put into the record these matters. They had little or no bearing upon the case, even within the wide scope permitted by the indictment. It seems a clear case of the Judge conducting the prosecution.

10. The Government witness Del Rocco was under examination touching the money he is alleged to have given the defendant Horton to fix pending cases. The Judge interrupted and asked the witness the following questions:

> "The Court: Did he tell you how he would use this $500.00?
> A. That he had to give it to the boss.
> Q. Did he tell you who the boss was?
> A. He said "the redhead". That he would only get a couple of dollars out of it for his end for going out there, very little." (Rec. 243.)

11. During the examination of Government's witness Frank Hodorowicz (Rec. 297), the Judge, addressing himself to the witness said:

> "Q. He said if Pete took ownership of the still, you would have the case discharged?
> A. He said it cost $800.00, so that night I came over and went to the north side some place. He said he had to deliver the money to Red, so we went to the north side, and he went in some lobby there and I went out in the corner to the saloon. He came back. He said everything is O. K. He said everything is taken care of for tomorrow morning.
> The Court: Had you paid the money before you came back?
> A. Yes, sir.
> The Witness: The next morning Pete and Clem Dowiat were discharged. That was the evening of September 23.
> The Court: Do you know?
> A. Yes, sir.
> Q. Whom did he mean when he referred to Red?
> A. Glasser.
> Q. The defendant in the case?

A. Yes, sir.
Q. You actually paid Kretske $800.00?
A. Yes.
Q. How did you pay it, in currency?
A. Yes, in cash."

12. During the examination of Government witness Anthony Hodorowicz (Rec. 348-349) the Judge examined the witness in regard to what facts were brought before the United States Commissioner who was hearing the charge against the witness. He had the witness state that a full disclosure of the facts in the case was not made before Judge Woodward, before whom the case was heard. Witness was asked by the Judge whether Judge Woodward asked the witness any questions, whether any lawyer asked him any questions, and especially whether Mr. Glasser asked him any questions. The Judge then said:

> "So you don't know. Your recollection is that there was not a complete disclosure of all the facts that connected you with that case before the judge?"

Upon the witness being asked by one of counsel for the defense whether he understood the term used by the Judge, he stated that he did not, to which the Judge made answer:

> "I will ask you this. Did your lawyer, or Mr. Glasser, or anyone in your presence, in the judge's, make any statement to the judge about your conduct in relation to the still and the charge in the indictment?
> A. No."

This witness then proceeded to state on cross-examination that there were no facts connecting him with the still, and there is no fact that he could have told in regard to any connection with the still. Counsel's final question along this line was:

"If they told the truth about you, all they could

state was that you were in that neighborhood, and that they arrested you near the still, is that right?

A. Yes.

The Court: Did you hear them tell the judge that?

A. No, I didn't." (Rec. 348-349.)

13. After the Government agent and witness Silvian White had been fully examined, cross-examined, and re-examined, the Judge, for the apparent purpose of rehabilitating this witness conducted the following examination:

"Q. Did you discuss or bring to the attention of Mr. Glasser a copy of that original affidavit?

A. Mr. Glasser had a copy of the original affidavit. I had discussed Mr. Frett's affidavit as well as the affidavit of Alfred Slesur, Cecil Simms, Lester Urbanski, who corroborated Joe Cole, at least in part or some parts of his testimony concerning Kaplan.

Q. If that other statement would correspond to the statement of the other witnesses—

A. That is true.

Q. You say now the statement of Peter W. Frett corresponded in detail with the statement of this other witness?

A. It corresponds in part.

Mr. Stewart: That is what I object to. He hadn't any right to say that.

The Court: Eliminate the word "corroborate"; and we want to know if the statements are alike.

The Witness: Not exactly, no, sir. There is more detail in Joe Cole's statement than in the others.

Q. In Joe Cole's?

A. Yes, sir.

Q. Are there some statements in the Frett affidavit that are similar to the statements in the Cole affidavit?

A. Yes, sir, exactly.

The Court: I think that is sufficient." (Rec. 805.)

14. The Judge took the direct examination away from the Assistant District Attorney of the Government witness Swanson, who had testified that he and others

charged with him had appeared before Judge Woodward, were represented by Roth, and the defendant Glasser represented the Government. They were told by Roth that the case would be continued until a certain day and upon that day the witness and others appeared, the case was continued, and the witness heard no more about it. At page 232:

"The Court: Did you pay a fine or anything of that kind?
A. No, we did not pay fine.
Q. The case just dropped out of mid-air?
A. Well, it dropped out.
Q. How long ago was that?
A. Well, that was in early part of 1938."

15. At Rec. 293-294, the Judge asked Commissioner Walker, who had testified favorably to the conduct of the defendant lawyers, this question:

"Q. Of course, all you observed was their conduct in your court room?
A. Oh, yes, surely."

16. Charles Ellis was a member of the grand jury and was examined, cross-examined and re-examined touching the conduct of the defendant Glasser before the grand jury. The Judge thus interfered with the re-direct examination:

"Q. Let me ask you a question. When Mr. Glasser appeared before the jury did he submit to you a report that he had obtained from any of the agents?
A. No, he had a report with him.
Q. Did he give it to the grand jury to examine?
A. No.
Q. Did he ask this man Cole anything about any interest Mr. Cole may have had in that still?
A. No." (Rec. 602.)

17. May Jerkus, a witness for the Government, was directly examined by the Assistant District. She had been

in defendant Glasser's office, talking about one Girardi, who was furnishing sugar for a still. The woman's husband had been convicted of operating a still. Mrs. Jerkus visited the District Attorney's office with her husband, who was in custody, and Glasser told her in effect that if they would disclose the name of the man who owned the still, her husband would be permitted to go home. At page 615 the Judge then proceeded to cross-examine this witness:

"The Court: Can you describe the appearance of Nick Girardi at that time?

A. He is about as tall as I am and heavy set.

The Court: Heavy set?

A. Heavy set fellow.

Q. What would you say his weight was?

A. I would say it was close to 200 pounds.

Mr. Ward: How tall are you?

A. Five feet, two.

The Court: About how old a man was he?

A. I would judge him to be about 40.

Mr. Ward: But he is the same Nick Girardi that was in the sugar business with Sol Tishman?

A. I know both of them.

Q. All right.

The Court: At the time you saw Mr. Glasser you knew him?

A. Yes, sir.

Q. You knew he was the man that furnished you with the furniture?

Yes, sir.

Q. Did you tell Mr. Glasser who he was?

A. I told him everything.

Q. Oh, you told Mr. Glasser?

A. Yes, sir. I told him just the whole story. How we came in from Oklahoma City and had no furniture and he gave us the furniture if he could put the still in the basement. I told him everything.

Q. You gave him the man's name?

A. Even the man's name."

18. Stanley Slesur, a witness for the Government, was directly examined by the District Attorney. He was at

the time confined in the United States Penitentiary. In the course of this witness' testimony, the Judge said (Rec. 625):

> "Listen, what we want here is the truth and nothing but the truth. Do you understand?
>
> A. Yes, sir.
>
> The Court: If you are testifying falsely on this stand, it may be a more serious offense than the one you are here on. We want you to tell the truth and nothing but the truth. If you went to the Tribune for some purpose say so."

The Judge then proceeded to cross-examine the witness as to whether he went to the Tribune Building. Witness said that he went to the Tribune Building to see the defendant Kretske, but only for the purpose of seeking a loan on his house. The Judge proceeded to cross-examine the witness, at page 627 of the Record:

> "Q. You stated now, that you called at Mr. Kretske's office in the Tribune Building with reference to the sale of your home, is that right?
>
> A. Yes, sir.
>
> Q. Or to obtain a loan?
>
> A. Yes.
>
> Q. You had a three thousand loan at that time?
>
> A. Four thousand.
>
> Q. What need of money did you have at that particular time?
>
> A. I needed it for my business.
>
> Q. Did you attempt to raise money on your home any other place before you went to Mr. Kretske's office?
>
> A. Couple of real estates.
>
> Q. What real estate office did you call on?
>
> A. On 63rd Street near Kedzie. I couldn't recall the name.
>
> Q. Was Mr. Kretske in the real estate business? Was he operating a real estate office at the time you consulted him?
>
> A. I don't know.
>
> Q. But you went there for that purpose?

A. Yes.

Q. Did you go there to consult him as a lawyer or as a real estate salesman?

A. Well, yes, there was a couple of more fellows, a real estate man and a lawyer.

Q. Did you go to see Mr. Kretske as a real estate salesman or lawyer?

A. We went to see that young fellow and somebody talked about my property at the same time, and I met Mr. Kretske.

Q. How did you happen to find yourself in Mr. Kretske's office?

A. How did I find it?

Q. How did you happen to go to Mr. Kretske's office?

A. I was downstairs and I don't remember that fellow's name and got upstairs to see Mr. Kretske. They told me to. I say what floor is he on, and that fellow, I don't know the name, Judge.

Q. You don't know his name?

A. Yes.

Q. And that is what you went up there for?

A. Yes, that is the truth.

The Court: All right, proceed."

19. Edward Wroblewski, an inmate of the Lewisburg Penitentiary was examined in chief by the Assistant District Attorney. He testified that the defendant Roth was his lawyer in a proceeding by the Government against him. He was asked how he came to retain Roth and said he could not tell. The Judge then proceeded to cross-examine this witness as follows (Rec. 644-646):

"A. I don't remember how I met Mr. Roth.

Q. How many lawyers have you hired in your lifetime?

A. Two.

Q. Who were they?

A. Three.

Q. Who were they?

A. Mr. Bolton, Mr. Roth and Mr. Gutsel.

Q. Did you hire Mr. Roth before you hired the other two?

A. After.

Q. After. Well, you must have some recollection of the circumstances concerning the employment of Mr. Roth. Now, tell us about it.

A. I don't quite understand your question.

Q. You know something about how you happened to hire Mr. Roth. Now tell us about it.

A. Well, I don't know. As I say, I don't remember how I got acquainted with Mr. Roth.

Q. How did you get acquainted with him?

A. I don't remember.

Q. When did you first see him? Where did you first see him?

Q. In his office?

A. Yes.

Q. How did you happen to go to his office?

A. I don't know.

Q. What is that?

A. I don't remember, your Honor.

Q. When was this?

A. After this trial in 1937, I think it was.

Q. In 1937?

A. Yes.

Q. Did somebody take you to his office?

A. I don't remember.

Q. How old are you?

A. Thirty-one.

Q. And what education have you had?

A. Two years high school.

Q. What is that?

A. Two years high school.

Q. And you don't want to tell us now how you got to Mr. Roth's office.

A. Your Honor, I don't remember.

Q. Why don't you remember? Is there any reason why you shouldn't remember?

A. No, no reason. I just don't remember.

Q. Did your brother take you up there?

A. I don't remember.

Q. How old are you now?

A. Past 31.

Q. How old is your brother?

A. Twenty-eight.

Q. You are 31.

A. Yes, your Honor.
Q. Mr. Roth represented you in Indiana?
A. Yes, sir.
Q. For the trial?
A. Yes, sir.
Q. And at that time you were convicted?
A. Yes.
Q. In a trial before the Court and jury?
A. Yes, your Honor.
Q. How much did you pay Mr. Roth?
A. $250.
Q. $250. And you don't know how you got to his office?
A. I don't know now how I ever got acquainted.
Q. Nobody recommended him to you?
A. No, sir. I don't remember whether it was a rumor about his name.
Q. What is that?
A. A rumor. I don't remember how I met Mr. Roth." (Rec. 644-646.)

20. The witness Swanson (Rec. 230) testified that Kretske told him that the "heat was on", which the witness interpreted as meaning that it was hot over in the Federal Building.

"The Court: What is that? It was hot over in the Federal Building, or something like that?
Mr. Ward (Assistant District Attorney): That is not climatically speaking; you don't mean that, do you?
The Court: What did you understand that to mean, by the heat was on?
A. Well, the heat was on them.
Q. By that what do you mean?
A. Well, that they were being watched, or something like that."

21. Clem Dowiat was a person who had been proceeded against criminally by the Government. He testified in regard to the procedure in his case before the United States Commissioner. The Judge interrupted the examination to ask the witness what he heard Mr. Glasser

say at the hearing before the Commissioner. (Rec. 270.) Witness knew the defendant Roth. He had gone over to Roth's office with his uncle. He was asked why he stopped on the way at Kretske's office and said he didn't.

> Mr. Ward: Doesn't it refresh your recollection if I tell you you stopped at Mr. Kretske's office?
> Mr. Stewart: Your Honor, I object to that. We are entitled to the witness' testimony.
> The Court: All right, but this witness is a little reluctant. He is rather evasive at times. Objection overruled. He may answer.
> The Witness: I don't get it.
> Mr. Ward: Would it refresh your recollection if I were to tell you from there you went to Mr. Roth's office?
> A. That might have been.
> Q. Do you recall being indicted for that offense?
> A. No, sir.
> Q. What?
> A. No, sir."

Examination by the Court (Rec. 273):

> "Q. Never heard the word, did you?
> A. No, sir.
> Q. Never heard of anyone being indicted?
> A. Yes, sir.
> Q. Sure you did. Don't try to evade and we'll get along faster. Now the Government has a lot of information about your conduct. You might as well answer without trying to evade."

On re-direct examination this witness was asked whether he could recall being before a judge with his uncle and Swanson: He answered yes. The judge then interfered as follows (Rec. 274):

> "The Court: Do you remember what court you were in before what Judge?
> A. In front of Walker, Commissioner Walker.
> The Court: That is the Commissioner?
> Mr. Ward: Do you remember being in a court

room similar to this that looked like this room?

A. No, sir.

The Court: Just mention the name of the judge.

Mr. Ward: Judge Woodward, you ask him that.

The Court: Were you in Judge Woodward's court room?

A. No, sir, Walker.

Q. Were you ever in Judge Woodward's court-room?

A. Yes, sir. I was on a different case. You are getting me all mixed up. I don't know if I am coming or going.

Q. Just listen to the question. As far as you are concerned, this is all water over the dam, so you might just as well answer the questions truthfully.

A. Yes, sir."

22. Gordon Morgan, Chief Clerk of the United States Attorney's Office, testified as to the result of a grand jury investigation. Of a certain grand jury in which the defendant Glasser represented the Government, he stated that there were twelve no bills returned. The judge then questioned the witness (Rec. 196):

"Q. That is the total number of cases presented?

A. By Mr. Glasser.

Q. To this grand jury?

A. Yes, sir.

Q. And of the twenty, there were twelve no bills?

A. Yes, sir."

23. William Brantman testified (Rec. 659) for the Government that he had given the defendant Kretske some money for the purpose of influencing the conduct of the defendant Glasser in a case against a third person. Brantman and this third person flatly contradicted each other in material particulars as will afterwards be shown. As the record discloses, Brantman was at all times a willing witness, except insofar as the testimony would be highly prejudicial to him. At all times when it would

injure any of the defendants without injuring himself, he was a most willing witness. Yet, we find this dialogue between the Judge and counsel for one of the defendants:

> "Mr. Stewart: (Referring to the testimony of Brantman.) Your Honor, when Mr. Ward puts these convicts on, I don't object, but I know your Honor would rule that they were possibly a little reluctant, but he is not a reluctant witness.
>
> The Court: The last two answers indicate he was a little reluctant. Objection overruled." (Rec. 659.)

24. Frank Hodorowicz testified for the Government (Rec. 341) and was by no means hostile, in fact, he showed great energy that in his testimony he could be of the greatest service to the Government and thus benefit himself as a convicted criminal. Counsel for the defendant objected to the District Attorney's obviously leading the witness in the questions put. The Judge in answer to this objection stated that this witness was in a measure somewhat hostile, and it was proper to lead him at times. "If you can proceed without leading, do so, but if you have to lead, do so."

25. On cross-examination of the defendant Glasser by the Assistant District Attorney, the collateral matter of what schools Glasser attended was gone into by the examiner. The Judge then took up the cross-examination thus (Rec. 990-991):

> "The Court: What education have you had to prepare yourself for the admission to the Bar?
>
> A. I went to De Paul.
>
> Q. How long did you go to De Paul University?
>
> A. I went there, I think about a year or so.
>
> Q. One year. Are you a graduate of high school? What high school did you graduate from?
>
> A. I went to Lane High School.
>
> Q. Did you graduate from high school?
>
> A. No, I didn't graduate.
>
> Q. How far did you go?

A. Well, I got my credits, you know.
Q. Then you went to De Paul for one year?
A. Yes, sir, then I went to Loyola.
Q. For how long?
A. About a year.
Q. And when you were at De Paul what did you study?
A. Law.
Q. And where else have you studied?
A. I have studied previously in a law office.
Q. In whose law office?
A. I can't think of his name right now.
Q. How long did you study in his office?
A. Oh, I studied in his office—
Mr. Ward: I can't hear you.
A. I studied for a couple of years in his office. I can't think of his name, it does not come to me.
The Court: What were the requirements at the time before you took the Bar examination?
A. I think three years you could have either law school, or study with a lawyer. I had the necessary qualifications.
Q. You took the Bar examination?
A. Yes, sir.
Q. Well, how long did you study in the law office?
A. Oh, I think I studied about two years, I don't remember.
Q. In whose law office did you study?
A. I can't think of the lawyer's name—it will come to me in a little bit. I have it at the tip of my tongue.
Q. Where was the office?
A. I think 69 West Washington Street.
Q. Miss McGarry was your secretary?
A. Yes, sir.
Q. And she made up this personnel record of Daniel D. Glasser?
A. Yes, sir. I didn't look at it at the time at all. I can tell you if there are any other mistakes, I doubt it. It says LL.D. there—
Q. What do you suppose LL.D. means, what is that?
A. There isn't any LL.D., I think there is a J. D. or LL. D.

The Court: It appears from this record he attended Loyola University from 1922 to 1925. Was that true?

A. No, sir.

Q. Did you give that information?

A. No, I didn't give it to her. I don't remember how that came out. Mr. Campbell knew I went to De Paul.

Q. It don't make any difference, you signed this?

A. Yes, sir, I gave it to Mr. Campbell. He knew the truth about it.

Q. I mean you read it before you signed it?

A. I didn't. It was not true. It was not under oath or anything.

Q. It don't make any difference whether under oath. You read it before you signed it, didn't you?

A. I don't remember. I really don't. And Mr. Campbell knew the truth." (Rec. 990-991.)

26. The Judge, beginning at Rec. 1000 and extending to Rec. 1002 thus cross-examined the defendant Glasser:

"Q. Don't you think the Judge wants to know the entire background?

A. No, sir, it is not fair.

Q. Not fair to who?

A. It is not fair to anybody, to the claimant.

Q. I think the court ought to know.

A. Here are the facts—

Q. Don't you think the Judge ought to know about anybody that appears before him?

A. Yes, sir. Leo Vitale was not before Judge Barnes. You see, it is a knocked-down statement.

Q. There was one Chrysler Sedan automobile before Judge Barnes?

A. I was representing the Government in that case. I know now that Mr. Roth had filed an appearance for Rose Vitale. I didn't remember that.

Q. Do you want to tell this Court and Jury you just knew Rose Vitale was represented by Roth before Judge Wilkerson, you heard it in this court room?

A. No, I want to say when I got the Bill of Particulars, I just had it back. That is the first time I

ever remember this case, when I got the Bill of Particulars. I don't remember if Victor Dowd, the Agent for the Alcohol Tax Unit, was there in Court that day before Judge Barnes. I assume he was. He said he was.

Q. And Victor Dowd, after he heard you make the statement to the Court of the libel, said to you, 'Let me take the stand, and I will save that car for the Government of the United States.' And you said, 'Get the Hell out of here.' Did you not?

A. I might have said it, I don't remember. It is possible, I might have. I might have made that answer telling him to get the Hell out of the courtroom. We couldn't have saved the car for the Government. I was prosecuting according to law. A libel is an attempt by the Government to condemn a car which has been seized and forfeited to the Government. They do that because that is the way they can get clear title to the car for the car—if the car is worth more than $500.00—

Q. Mr. Glasser, will you tell this Court and jury—

A. You don't want me to answer?

Q. All right, go ahead, and answer.

A. The libel law is to the effect after a car is seized, if the car is worth more, if it is seized by the Agents for the Alcohol Tax Unit, it is worth more than $500.00, the Alcohol Tax Unit has it appraised, they have it appraised by its Appraisal Department, and if it is worth more than $500.00 they will send it over to the District Attorney's office, so they may file a libel, if the car is worth less than $500.00—

Q. Aren't you talking about the matter of seizure rather than what a libel is?

A. That is the only way I can tell what a libel is. I don't remember how many cases I handled when I was in the United States Attorney's office, quite a number.

Q. Isn't it a fact, Mr. Glasser, if an automobile is found on the premises where there is also found an unregistered still, that if it is found within the enclosure, and you have got evidence which can establish that the particular automobile found within the enclosure of the unregistered still, was on numerous occasions followed by the Alcohol Tax Unit, and ob-

served and seen cans of alcohol being placed on it, and license number changed on it, and traced to the premises where the still is actually found, do you consider that fairly good evidence that the automobile was being used to defraud the United States Government out of the taxes on alcohol?

A. Yes, sir.

Q. That is what was done in the Vitale case?

A. No, sir, you are showing me a criminal file, and not the civil file, that is not fair. The criminal file is not used in connection with the civil file. I never did. It shouldn't be. They have a special investigation, and special department that works on it, Judge."

G.

The prejudicial acts of the Assistant District Attorney made the basis of the foregoing assignments of error may be thus summarized:

1. Government witness Workman testified (Rec.-209) that he was on probation. He was then asked by the District Attorney whether from the time he was placed on probation to the 31st day of March, 1939, the defendant Glasser ever called him into the office to talk about the case. The Judge asked the Assistant District Attorney what occasion Mr. Glasser would have to call him into the office after that, to which the District Attorney rejoined, "It is merely a circumstance to show interest."

"The Court: Never mind. Objection overruled. He may answer.

The Witness: No, sir."

This question was also put on re-direct examination and was not responsive to any matters touched upon by cross-examination.

2. The Assistant District Attorney put the testimony he desired in the mouth of Elmer Swanson, the

Government witness while testifying on direct examination, in the following manner (Rec. 229):

"A. Well, the case was supposed to be taken care of for $800.00, and nobody was supposed to go to jail.

Q. Was there something said about $1,200.00 at this time?

A. Well, the $800.00 was supposed to be the first payment, and when everything was all over, why the rest of it was supposed to be paid.

Q. Was there $500.00 in currency paid to Kretske at that time?

A. I think it was $500.00, if I'm not mistaken.

Q. And the balance was to be $700.00, is that it?

Mr. Stewart: Well, your honor, we would like to have the witness' testimony and not Mr. Ward's. We object.

The Court: If the witness knows, speak out and tell us what the facts are.

The Witness: A. Well, I think it was $500.00, and there was a $700.00 balance, it was $1,200.00 in all."

3. The Assistant District Attorney re-cross examined and the Judge permitted to re-cross examine the defendant Koth in regard to a subject matter which had been thoroughly covered in previous examinations. An objection was interposed on that ground and overruled. (Rec. 882-884.) The Assistant District Attorney then proceeded to an extended examination on these foreclosed matters, which was prejudicial to the defendants. (Rec. 882-884.)

4. The Assistant District Attorney conducted an unfair and insidious cross-examination of Judge Michael Igoe, a witness for the defense, seeking by innuendo to prove that the Judge was acquainted with the criminals who were involved as violators of the liquor laws of the United States, and who were concerned in the alleged conspiracy, as follows (Rec. 907-908):

"Q. Now, Judge, do you know a man named Clem Swanson, I mean Elmer Swanson?

A. Not by name.
Q. Do you know a man named Clem Dowiat?
A. Not by name.
Q. Do you know a man named Kamarek?
A. No.
Q. Do you know a man named H. L. Welch?
A. Those are evidently the names of those defendants, from this report; I don't know any of them, if that is what you are trying to find out.
Q. Why do you say that?
A. Because the names are here. Here is Charles Swanson, Clem Dowiat. How did you think I might know them?
Q. Is H. L. Welch one of those?
A. I don't think—
Q. I know you read that report.
A. What makes you think I might know them?
Q. I only asked you—
A. Well, you did ask me, I ask you what makes you think I might know them?
Q. You say you don't know them.
A. I am telling you I don't know him.
Q. That is the point. You say you don't know them, but Mr. Glasser does know them?
A. I don't know anything about them.
Q. But you don't know?
A. You know I don't know them. You don't have to insinuate I do, either."

5. The Assistant District Attorney refused to permit the defendant Glasser to examine the file and reports in his possession for the purpose of refreshing his recollection on cross-examination, notwithstanding the order of the court to that effect. (Rec. 979, 982, 983.)

6. The Assistant District Attorney placed Thomas Bailey, a rebuttal witness for the Government, on the stand for alleged rebuttal and interrogated him in regard to his connection with the Treasury Department, which was received under objection. He was asked regarding his services with the Treasury Department after 1926.

He testified that he had been stationed at Philadelphia, Wilmington, Delaware, Baltimore, and in the Western District of Virginia. That a John Paul was District Judge and Joseph Chitwood District Attorney of that District. That he had two assistants, Frank Tavner and Art Gilmer. The name of the District Clerk was Clarence Gentry. That he had investigated cases which resulted in trials before Judge Paul. That he had been awarded during the World War the American Distinguished Service Cross, the French Croix du Guerre, with a gilt star, and the purple heart of an oakleaf cluster. That he had been a lieutenant and battalion commander in the World War. That these decorations were received for valor, and that the purple heart was received because of the witness receiving two wounds in action. That he had never been run out of the south or ordered out of a courtroom by a judge. All this was received subject to objection and exception. (Rec. 1039-1040.)

7. While Government witness Del Rocco was testifying in regard to alleged transactions between offenders against the law and defendants Horton and Kretske, the Assistant District Attorney said to the witness:

> "Was there anything said there about their not being brought to trial?" (Rec. 244.)

8. These words were put in the mouth of the witness by the Assistant District Attorney in the examination of William Wroblewski (Rec. 636):

> "Q. Well, now, would it refresh your recollection if I was to call your attention to a statement that you made to Mr. Devereux and Mr. Bailey on August 3, 1939, in which you said, 'On one occasion while I was in Roth's office, he, Kretske, said to me if I had any cases fixed, don't talk about them or you will get into some trouble.' Do you remember that?
>
> A. I don't believe it was Mr. Kretske.

Q. Who told you that?

A. Well, the way that come out. I went down to see Mr. Al Roth, and I told him that I was having trouble with the law. I said that the law is looking for some information from me, and Mr. Al Roth told me if I gave information to anybody I would be implicated in the case.

Q. Was it he used the word 'implicated'?

A. That is right.

Q. So that was an occasion when you were in Roth's office that Mr. Roth said that to you?

A. Yes, sir.

Q. Now, are you sure he didn't say: 'If I had any cases fixed, don't talk about them or you will get into more trouble'? That he didn't use that language?

A. Well, I might have expressed myself that way at the time, but I recall now that the right word is implicated.

Q. Implicated?

A. Yes, sir."

9. These leading questions were put to the Government witness Brantman by the Assistant District Attorney (Rec. 660-661):

"Q. Didn't Mr. Kretske tell you to get the five thousand dollars?

A. I don't know, he might have said the work was worth that.

Q. Do you recall a long conversation in the District Attorney's office?

A. I might recall some of it. They asked many questions.

Q. Do you recall Mr. Devereux asking: 'Q. Didn't Mr. Kretske tell you to get five thousand dollars from Nick? A. Yes, sir.' Do you recall that?

Mr. Stewart: May I object? He has no right to bring before this jury what was said in the District Attorney's office.

The Court: Objection overruled.

Q. Do you remember that question?

A. I don't remember that question. I am trying to recall the conversation."

10. Government's witness Edwin Walker, who had testified as to his method of procedure in the cases brought before him, was asked by the Assistant District Attorney (Rec. 289):

> "It does not mean that there may not be probable cause, but that it was not shown to you."

11. On direct examination of Government witness Workman the Assistant District Attorney put the testimony in the witness' mouth in the following way (Rec. 206):

> "Mr. Ward: Q. Now, did you discuss with any person, your case? I don't want you to say what was said. but did you discuss with any person anything about your case before you went to Ed Hess' office?
>
> A. No, I don't recollect that I did.
>
> Q. Did Mr. Ramsey talk to you about it?
>
> Mr. Stewart: I object. He said he did not recollect that he did. The prosecutor has no right to cross-examine his own witness.
>
> Mr. Ward: Q. Would it refresh your recollection if I were to say to you that you had a conversation with me in my office in which you told me that Ramsey was Schiabone and that you talked to Ramsey before you went to Ed Hess' office? Would that refresh your recollection?
>
> Mr. Stewart: May I have a ruling, your Honor? That is proper.
>
> The Court: Overruled.
>
> Mr. Stewart: Exception."

12. The Assistant District Attorney on re-direct examination permitted by the Court went into subject matter of the direct examination which had not been opened up by cross-examination and had the Government Witness, Victor Raubunas, testify that he was inside of the delicatessen store on the first occasion and saw Louis Kaplan coming. That Kretske came to the corner of the

store in a green car, and opposite him sat the defendant Glasser. (Rec. 520-523.)

H.

The Court erred in admitting and permitting to be read to the jury Exhibits Nos. 81A and 113 as evidence against the defendant Kaplan, and holding that it was for the jury to determine if they were evidence against anyone else. (Rec. 533, 534.)

Exhibit 81A is a report of the Internal Revenue Service, Alcohol Tax Unit, dated July 14, 1937, case 4570-M, pertaining to Victor Raubunas, Louis Kaplan, Adam Widzes, *et al.*, concerning premises at 2524-34 South Western Avenue, Chicago, Illinois, with seizure list, together with statements of witnesses. It contains the rankest hearsay, setting forth that a man giving the name of L. Davis, later identified as Louis Kaplan, ordered four tons of coal delivered to a building with a high smoke stack at 2524 South Western Avenue. That he continued to place orders periodically up to and including May 15, 1936, at which time orders totaling 450 tons had been placed. That a still had been set up in this building. It further states that Frank Hill, to be used as a Government witness knew Kaplan for three years previous to this date. That he did not see him until the still began to operate at 2524-36 South Western Avenue, November, 1935, to June, 1936. During the period the still was operating Kaplan came to Hill's office several times. That James Brown while working at 2534 South Western Avenue, saw Kaplan come from the still room, also saw Government witness Raubunas. Clem Haydock and Edward Jawor, employees of the Pulaski Coal Company, identified Kaplan as L. Davis who had ordered coal delivered to the building with the

high smoke stack at 2534 South Western Avenue. Murray Ellis saw Kaplan around the premises. Lawrence Craven saw Kaplan meet with other defendants in his gas station at 3915 Ogden Avenue.

Exhibit 81A further contains the recommendation that Frank Hill, Murray Ellis and James Brown be allowed to testify on behalf of the Government. While they are more or less reluctant witnesses, it is the belief of the investigators that if they are requested to appear at the office of the United States Attorney before the trial they will testify favorably. That Lawrence Craven is also a reluctant witness and it recommended that the same procedure be followed with him. Exhibit 81A continues as follows:

> "Louis Kaplan, 3125 W. 19th St., Chicago, Ill., male, white, Jewish descent, age 55, height 5 feet 8 inches, weight 215 pounds, stocky build, married, citizenship not known, owns and operates the Kaplan Motor Sales Company, 3152 Ogden Ave., Chicago, Ill. (Automobile sales agency for the Nash car.) Reported to be worth approximately $200,000.00, criminal record not known with exception of his reputation as a bootlegger in Chicago, Illinois. (A Louis Kaplan was arrested at 616 West Madison St., Chicago, Ill., for violation of the National Prohibition Act on May 10, 1923, and sentenced to pay a fine of $300.00; a man by the same name was also arrested by Chicago police officers February 7, 1935, together with one Edward Dewes, in connection with the killing of Tony Pinna and seriously wounding Vito Messino at Louis Kaplan's garage, 3152 Ogden Ave., Chicago, Ill., in which Louis Kaplan stated that he was a victim of an attempted kidnapping and was released.)"

Exhibit 113 is a report of the Internal Revenue Service, Alcohol Tax Unit, Chicago, Illinois, dated July 2, 1937, their own case No. 4957-M, concerning violation of internal revenue laws by carrying on business of a distiller, by

possession and control of a still, etc., at Spring Grove, Illinois, by Louis Kaplan, Victor Raubunas, Edward R. Dewes, Stanley Slesuraitis, Joseph F. Cole, Louis Pregenzer, Lincoln Rankin, Ralph Bogush, Joe Fernandez, and Ceil Simms, containing narrative history of evidence, seizure, statements of witnesses, chemist's report, with finger print reports of Louis Kaplan, Lincoln Rankin and Louis Pregenzer. In substance, it sets forth that Louis Kaplan is implicated by Peter Frett; that Kaplan took part in the negotiations for a lease in the old Borden Milk Plant. That he was present at the first conversation. That he went to the office with Dewes and returned to the tavern. That the person identified from pictures as Kaplan gave Dewes alias Schwahn, the money to pay for the rental of the plant. That Kaplan came to one Schnitzler's office at a lumber company in November and December of 1936, accompanied by Dewes, Slesur and Cole. That orders for coke were placed and Kaplan guaranteed payment for orders placed by any of the parties. That Sylvester Urbanski identified Louis Kaplan as visiting the premises of the Highway Tavern in Fox Lake, Illinois. That Joseph Cole says Kaplan inspected the premises in October, 1936, for erection of an illicit distillery. That he was present when Louis Kaplan gave some money to Edward Dewes who in turn gave it to Peter Frett, at which time Kaplan stated he had obtained a lease for the milk plant in Spring Grove. That Kaplan gave him instructions to purchase coke and deliver to the milk plant. Kaplan instructed him to arrange for board and room for the men who would be employed at the still and will pay him forty or fifty dollars a week for his assistance in obtaining the lease, ordering coal and boarding employees. That he heard Louis Kaplan instruct Stanley Slesur to change one of the valves and one of the steam pumps after the still was in operation.

That Kaplan agreed to deliver to him 1250 gallons of alcohol as a reward for his services. That the records of the Illinois Bell Telephone Company show many calls from Fox Lake 97 to Crawford 6663, which is listed in the name of Mrs. Jenny Kaplan, 3125 W. 19th Street. That Peter Frett says he was paid $2,500.00 by Louis Kaplan; that Joe Cole says Frett got $500.00 for his business and $25.00 or $30.00.

Said Exhibit 113 contains the following recommendation by agents:

> "It is recommended that Defer lant Cole, Fernandez and Simms be used as a witness for the government in order to strengthen the evidence against the principals Kaplan, Raubunas, Dewes and Slesur. The last four named defendants have long been identified with illicit alcohol activities in the Chicago area, and owing to their methods of operation it has been very difficult to obtain evidence for an arrest and conviction."

This Exhibit contains the same description of defendant Louis Kaplan as was appended to Exhibit 81A.

When it is recollected that Kaplan was a co-defendant in this case, and any legal evidence introduced against him would be identically the same as the legal evidence introduced against any other defendants, there remains no ground of contention that the introduction of these two exhibits was not prejudicial and reversible error as to each appellant in this cause.

In *Cook* v. *U. S.*, 138 U. S. 157, 184, 34 L. Ed. 908, 913, *supra*, the Court said:

> "At the trial below, one of the defendants' counsel, who had been attorney-general of Kansas, and who, in that capacity made to the governor of that State a report touching the death of Cross immediately after it occurred, was called in rebuttal for the prosecution. That report contained various statements purporting

to have been made by the defendants, and which connected them with the killing of Cross. Although the witness stated that the report was based upon hearsay evidence merely, was thrown hastily together by a stenographer, and was incorrect, and that the defendants had not made the statements attributed to them, certain parts of it were admitted in evidence to the jury, against the objection of the defendants. The record shows that this report was read in evidence to show that the witness had made different statements at another time and place. And the Court, in its charge, said to the jury: 'The instructions given above are limited, so far as the evidence is concerned, by the following instructions: The portions of Attorney-General Bradford's report was admitted to be considered by you as to whether or not the statements contained were made by the parties to said Bradford, said Bradford now being attorney for the defendants and denying the truth of the statements therein contained; and as to whether or not these statements were ever made to said Bradford is a question of fact to be considered by you from all the evidence on that subject; and if you believe that the statements were not so made to said Bradford, you are to disregard the same. But if you believe from the evidence that they were so made to said Bradford, then you are instructed to consider them as evidence, but only as to such parties by whom they were made.' The jury were thus informed that this report, although merely hearsay, was substantive evidence upon the issue as to whether the defendants were present at, and participated in the killing. The representatives of the government in this court frankly conceded, as it was their duty to do, that this action of the court below was so erroneous as to entitle the defendants to a reversal.

"For the error above mentioned the judgment is reversed and the cause remanded with directions to grant a new trial."

In *Logan* v. *U. S.*, 144 U. S. 263, 36 L. Ed. 429, *supra*. the Court said:

"There being other evidence tending to prove the

conspiracy, and any acts of Logan in furtherance of the conspiracy being therefore admissible against all conspirators, as their acts, the admission of incompetent evidence of such acts of Logan prejudices all the defendants and entitled them to a new trial."

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

EDWARD M. KEATING,
Counsel for Petitioner.

JOSEPH R. ROACH,
Of Counsel.

APPENDIX.

STATUTES INVOLVED.

Section 88, Title 18, U. S. C. A., is as follows:

> "If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Section 91, Title 18, U. S. C. A., is as follows:

> "Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of any thing of value, to any officer of the United States, or to any person acting for or on behalf of the United States, in any official function, under or by authority of any department or office of the Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding, which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years."